BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. CALIFORNIA DEPARTMENT OF CORRECTIONS, a public entity, Respondent. GERI LEANA BARR, Complainant.	Case Nos. E-9900-C-0004-00-pe C 00-01-002 O3-11-P DECISION ON RECONSIDERATION

Hearing Officer Mark Woo-Sam heard this matter on behalf of the Fair Employment and Housing Commission on October 30 through November 1, 2001. Darcy Griffin, Staff Counsel, represented the Department of Fair Employment and Housing. Michael W. Pott, of the Law Offices of Porter, Scott, Weiberg & Delehant represented respondent California Department of Corrections. Complainant Geri Leana Barr was present at the hearing.

The record was held open for post-hearing briefs, which were timely filed. On February 13, 2002, the parties filed a stipulation to stay issuance of a Proposed Decision in this matter pending the California Supreme Court's decision in Colmenares v. Braemar Country Club (2003) 29 Cal.4th 1019. On February 20, 2003, the Supreme Court issued its decision.

On April 15, 2003, Hearing Officer Mark Woo-Sam issued his proposed decision. On April 29, 2003, the Commission adopted the proposed decision as its decision in the case. On May 22, 2003, respondent California Department of Corrections filed a Motion to Extend Time for Reconsideration and on May 23, 2003, the Commission issued an Order Extending Time to File Petition For Reconsideration. Respondent California Department of Corrections filed a timely Petition for Reconsideration on June 23, 2003. The Commission issued an Order Re: Petition for Reconsideration on July 1, 2003, granting reconsideration on the question of whether the non-monetary penalties ordered in the final decision should be

modified. After consideration of the entire record, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On July 6, 1999, Geri Leana Barr (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) alleging that, within the preceding year, the California Department of Corrections discriminated against her based on her disability (hip calcific bursitis) by failing to reasonably accommodate her in her position as a registered nurse, in violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.)

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On July 6, 2000, Dennis W. Hayashi, in his official capacity as Director of the Department, issued an accusation against the California Department of Corrections, alleging that it violated Government Code section 12940, subdivisions (a), (k), and (i), by discriminating against complainant on the basis of her physical disability (chronic gluteal myofascial pain and recurrent bursitis) or perceived physical disability, by failing to reasonably accommodate complainant's physical disability, and by failing to take all reasonable steps necessary to prevent discrimination from occurring.

3. Complainant has worked as a registered nurse since 1985, and began her employment with the California Department of Corrections (respondent) in June 1995, at the Central California Women's Facility, a correctional facility located in Chowchilla, California. Respondent is obligated to provide medical care to the inmates and employs medical personnel to cover its various "posts." In addition to its regular medical staff, respondent utilizes "registry" nurses--nurses employed through an agency for limited, non-permanent assignments. Respondent is an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivision (a).

4. The posts at which respondent's registered nurses work consist of: medical clinics located in each of respondent's four "yards"; a mental health crisis unit; an emergency room open 24 hours a day; an infirmary/skilled nursing facility open 24 hours a day; and a reception center. Complainant first worked as a nurse on the night shift from 7:00 p.m. to 7:00 a.m., for approximately eight months in the mental health crisis unit of respondent's skilled nursing facility, performing duties including admitting and discharging patients, charting and filing, and ensuring inmates received their medications on time. Complainant next worked in the "yard," from 7:00 a.m. to 3:00 p.m., for approximately one year. At this post, complainant's duties involved assessing inmates' health complaints to determine whether they needed immediate medical care, a referral to the doctor, or could wait for treatment. Following that, complainant worked in various other posts and shifts including

the day and night shifts in the mental health crisis unit, the emergency treatment room, and as a "rover" and vacation relief--a position which required her to work at any post at the facility.

5. On October 27, 1997, complainant injured her lower back while restraining an inmate who was undergoing a seizure. On April 12, 1998, and again on May 6, 1998, complainant re-injured her back, causing her to be off work from May 7, 1998, to June 14, 1998, then placed on "modified duty" (also referred to as """"light duty") through September, 1998. While on modified duty, complainant's shifts were limited to eight hours.

6. On November 10, 1998, Dr. Jonathan Wiens, staff physician in physical medicine and rehabilitation with Kaiser Permanente, diagnosed complainant's condition as gluteal myofascial pain and recurrent left side trochanteric bursitis. Trochanteric bursitis refers to inflammation of the fluid-filled sac (bursa) resting between muscle tendons and bone, located at the lateral portion of the femur below the hip joint. When this inflammation occurs, it can result in pain in the hip and gluteal muscles with movement and bearing weight. Complainant's bursitis caused chronic pain and limited her ability to walk or remain on her feet for prolonged periods. Complainant's bursitis is also aggravated by physical activities involving bending, twisting, stooping, squatting, and lifting. On occasion, the bursitis interfered with complainant's sleeping, causing her to wake with pain when she rolled onto her left side while asleep.

7. Notwithstanding the pain, complainant could perform the physical tasks required in her job including: frequently lifting and carrying supplies and equipment weighing 6 - 25 pounds; raising and loading patients on gurneys and into wheelchairs; walking up and down the staircase of a two-story building; walking rapidly; working on her feet up to eight hours of a twelve-hour shift; stooping and squatting to obtain supplies from lower shelves; and opening and closing heavy steel doors and cabinet drawers. However, the longer she works, the greater complainant's pain. Occasionally it reaches the level of "intolerable" after an eight-hour shift.

8. On February 10, 1999, Dr. Wiens re-evaluated complainant and diagnosed her condition as essentially unchanged--back sprain and strain, and bursitis, generally referring to complainant's ongoing gluteal myofascial pain in the left posterior hip area. During this evaluation, complainant informed Dr. Wiens that her pain worsened while working 16-hour shifts. In an Industrial Injury Visit Verification report prepared for respondent that day, Dr. Wiens wrote that complainant should not work double shifts and "would do best long term to avoid reinjury at a non-roving position." By these restrictions, Dr. Wiens felt that complainant could plan her motions, pace her work responsibilities, and thereby minimize the risk of aggravating her back and gluteal muscles, bursitis, and consequent pain.

9. After receiving complainant's Industrial Injury Visit Verification from Dr. Wiens, on February 22, 1999, respondent's Return to Work Coordinator, Nancy Clark, wrote to complainant, asking her to complete respondent's Request for Reasonable Accommodation form CDC 855.

10. On March 31, 1999, Dr. Wiens re-evaluated complainant, and in a report for State Compensation Insurance Fund, wrote:

> The patient is currently at a Permanent and Stationary point. There is some mild, partial disability in the fact that she should not do double shifts. it [sic] would be best for her long term to avoid reinjury by keeping a nonroving nurse position or she may plan out her motions. She is still allowed to do her job with no particular restrictions except avoiding the overwork situation as mentioned. There are no other lifting or moving restrictions as long as she moves with proper body mechanics and asks for help with reasonably heavy loads as would be prudent with any job, using common sense.

11. On April 16, 1999, Jerri Callahan, vocational rehabilitation counselor for State Compensation Insurance Fund, wrote to Nancy Clark. In this correspondence, Callahan enclosed a job analysis for the registered nurse position with respondent, augmented by complainant's handwritten modifications and descriptions. In addition to listing the specific duties of nurses in the various posts, the job analysis provided that nurses work eight or twelve-hour shifts depending on the post, plus overtime as demanded by around-the-clock staffing needs. The description also noted, "overtime work is frequent, and may be assigned on a voluntary or non-voluntary basis. Registered Nurse's [sic] may come to work on their days off, or they may work shifts of 16 hours, depending on the needs of the facility." On April 23, 1999, Clark wrote to Callahan, stating that the job analysis, including complainant's additions and modifications, accurately depicted the duties of the nurses at the Chowchilla facility.

12. Concerned that respondent might not grant her an accommodation in working hours, complainant began to explore other potential work opportunities. In May 1999, complainant began working for the Madera Unified School District as a nurse, three to four hours per day in the morning, three to five days per week. Complainant worked for the School District until October 1999. Some days, following her morning shift at the school, complainant worked an eight-hour shift with respondent, working a combined total of around 12 hours.

13. On May 17, 1999, Dr. Wiens re-evaluated complainant and, in an Industrial Injury Visit Verification for respondent, again wrote "no double shifts, single 8 to 12-hour shifts okay, [complainant] would do best long term, and avoid re-injury by keeping a non-roving nurse position." As requested by Nancy Clark's February 22nd letter, on May 28, 1999, complainant filed a Request for Reasonable Accommodation form CDC 855, with respondent. In this form, Dr. Wiens wrote "[a]void double shifts in scheduling" as the requested accommodation. Dr. Wiens further wrote:

> Due to her back injury, chronic persistent muscle spasms, with underlying hip calcific bursitis/mild lumbar disk degeneration,

> she could continue to function normally at work, with normal duties, but to avoid the fatigue and restraining [sic] that comes with double shifts. Previous attempts to return to double shifts has [sic] resulted in exacerbation of spasm. This modification does not only fall under the ADA policies, but under the workers compensation guidelines for work accommodation. Please see industrial medical reports for more details.

14. In response to this formal request for reasonable accommodation, Nancy Clark undertook steps to determine whether or not the request could be granted, including: retrieving the State Personnel Board specifications for nurses in the facility; reviewing the official job analysis that had been completed the prior month; speaking with the director of nursing, the associate warden of business services, the employee relations officer, and reviewing the collective bargaining agreement to determine if overtime was required of registered nurses.

15. The collective bargaining agreement between respondent and Bargaining Unit 17 (the union representing nurses in its facility) described the nurses' regular work shift as eight hours per day. The agreement also permitted respondent to require that its nurses work overtime; however, the agreement did not indicate nurses must be able to work 16-hour shifts or otherwise state the length of overtime nurses could be required to work. Moreover, the agreement did not obligate respondent to require its nurses to work overtime, and instead provided that respondent would make efforts to minimize the need for mandatory overtime through such means as voluntary overtime, employing intermittent personnel, registries, and float pools.

16. Under respondent's temporary modified duty policy, employees could be limited to eight-hour shifts. Through this policy, employees could receive up to 120 days modified duty per year, with the return to work coordinator authorized to approve the first 60 days, and the warden approving up to 60 additional days. From 1998 to 2001, Clark granted temporary modified duty 10 to 15 times for employees, but less than five times for nurses in the facility.

17. From January 1997 to August 1999, Shirleen Wright Pearson served as the director of nursing, responsible for overseeing all of respondent's registered nurses including, at times, scheduling their shifts. In considering complainant's request, Wright-Pearson felt that while respondent could temporarily restrict complainant's work to eight hours without difficulty, it could not guarantee that restriction on a permanent basis because of potential situations such as complainant's relief arriving late or calling in sick shortly before complainant's shift ended, as well as unexpected emergency circumstances.

18. In Clark's discussions with Gloria Henry, respondent's associate warden of business services, and Celeste Landis, respondent's employee relations officer, they concluded that complainant did not have a disability entitling her to accommodation. As a result of these discussions, respondent decided to deny complainant's request for reasonable accommodation on the stated basis that ability to work 16-hour shifts was an essential job

function, and for the additional reason that allowing complainant to be available for only 12-hour shifts would pose an undue hardship, because another nurse would be required to cover the overtime that complainant could not work.

19. On June 14, 1999, Nancy Clark telephoned complainant and instructed her not to report for work. The instruction confused and upset complainant since she had worked each day prior without incident. However, Ms. Clark told complainant that respondent had received Dr. Wiens' May 17th note, that the note stated complainant could not work longer than a 12-hour shift, and that respondent could no longer accommodate that restriction. Not permitted to report for work, complainant felt angry and helpless, crying because she was unsure what to do next or how her family's financial obligations would be met. Complainant was her family's sole income-earner and had been earning $4,054 per month with respondent.

20. In a letter dated June 18, 1999, written by Nancy Clark and signed by Warden Teena Farmon, respondent advised complainant that it had received Dr. Wiens' March 31, 1999, report. The letter stated that based on complainant's restriction on double shifts and request for a nonroving position, complainant was unable to perform the duties of her position and therefore could elect to pursue one of several options including: 1) resigning from state service; 2) applying for service retirement; 3) electing vocational rehabilitation benefits in lieu of returning to employment with respondent; or 4) demoting to another position provided she met the minimum qualifications. As an alternative, the letter advised that complainant could request to use her leave balances or request time off under the federal Family Medical Leave Act and the California Family Rights Act. Additionally, the letter stated that if complainant felt she were disabled and that a reasonable accommodation would enable her to perform the essential functions of her position, she could submit a request for reasonable accommodation form to Nancy Clark. Having already filed such a request on May 28, 1999, complainant did not submit another request for reasonable accommodation form.

21. In a letter to complainant dated June 16, 1999, Jerri Callahan, Vocational Rehabilitation Counselor, wrote that Dr. Wiens had indicated complainant was unable to return to her usual and customary occupation, and that there was no modified or alternate work available with respondent at that time. The letter advised that complainant might, however, be eligible for vocational rehabilitation benefits. Upon reading this and Warden Farmon's June 18, 1999, letter, complainant again became fearful that she would be unable to earn the money upon which her family depended. She also experienced anxiety, difficulty sleeping, and lost self-esteem, wondering whether she would ever be permitted to return to work. Complainant ultimately requested and received vocational rehabilitation benefits in order to maintain some income. From June 14, 1999, to January 11, 2000, complainant received industrial disability leave benefits totaling $23,180--slightly higher than two-thirds of the total monthly salary, which would have been $4,054 for the months of June and July, $4,208 for the months of August and September, and $4,371 for the months of October, November, December and January, respectively.

22. On July 1, 1999, Nancy Clark wrote to complainant, informing her that her request for reasonable accommodation had been denied. In this letter, Clark stated that because respondent's facility operated 24 hours a day, and in light of the severity of staff vacancies, it would pose an undue hardship to grant complainant's request that she not work double shifts. During June 1999 respondent's facility had less than 20 nurses and was "short-staffed" by approximately one-third (or about nine to ten nurses). Additionally, overtime had been prevalent among the nurses for the preceding several months. However, as of June 14, 1999, complainant had not worked a double shift since December 13, 1998.

23. On July 23, 1999, complainant wrote to the California State Personnel Board to appeal the denial of her request for accommodation. Because of this appeal, sometime after July 1999, complainant spoke with Dr. Wiens and asked him to change his restriction to "something more prophylactic sounding," or something "softer" than an absolute restriction on working double shifts.

24. On September 16, 1999, Dr. Bruce Gillingham, orthopedic surgeon for the United States Navy and qualified medical examiner for the State of California, performed an agreed medical evaluation of complainant for respondent. In his report dated October 16, 1999, Dr. Gillingham diagnosed complainant as having "chronic left greater than right lumbosacral paraspinal muscular strain," characterized by intermittent slight pain, increasing to intermittent slight to moderate pain with bending, stooping, very heavy lifting, pushing, pulling, and other activities involving comparable physical effort. In Dr. Gillingham's opinion, complainant's condition made activities including walking, camping, hiking, and gardening, more difficult because of the bending and stooping required. Dr. Gillingham also determined that complainant experienced pain after standing for one hour, and had lost approximately 25% of her ability to lift under workers' compensation guidelines--meaning that complainant could lift up to 50 pounds in a single episode, but less than 20 pounds repetitively. Lastly, Dr. Gillingham considered complainant to be "permanent and stationary"--meaning that no further change in her condition was anticipated.

25. Despite complainant's condition and attendant limitations, Dr. Gillingham stated that he agreed with Dr. Wiens' assessment that complainant was capable of performing all of her work duties, including occasionally lifting over 100 pounds to transfer patients. But, complainant's work shifts should not exceed 12 hours in order to minimize the risk of exacerbating her condition. Recommending that complainant work no longer than 12-hour shifts, Dr. Gillingham reasoned that given her history of low back pain, standing for prolonged periods in a double shift of 16 hours was beyond complainant's tolerance for pain.

26. On January 5, 2000, Dr. Wiens spoke with complainant. In a Visit Verification Record prepared for respondent that day, Dr. Wiens stated that complainant could return to regular work on January 10, 2000, but wrote "prefer no double shifts" instead of his previous instruction that she not work double shifts. Dr. Wiens, however, did not consider complainant's condition to be changed, and felt that she should not work double shifts. Based on the changed wording in Dr. Wiens' note to "prefer no double shifts," respondent permitted complainant to return to work on January 11, 2000. Since then, complainant has

worked in her position as a registered nurse continuously up to the time of hearing in this matter, and worked 16-hour shifts slightly more than five times up to the time of hearing.

DETERMINATION OF ISSUES

Liability

Under the FEHA, it is unlawful for an employer to fail to make reasonable accommodation for the known physical or mental disability of an employee unless doing so would pose an undue hardship on the employer, or even after accommodation has been made, the employee is unable to perform the essential functions of the job. (Gov. Code, Code § 12940, subds. (a) & (k); Cal. Code Regs., tit. 2, § 7293.9.)[1] In both cases, it is the employer's burden to demonstrate that the proposed accommodation would pose an undue hardship or that the employee cannot perform the essential job functions. (Cal. Code Regs., tit. 2, § 7293.9.)

A. Existence of a Physical Disability

The threshold issue in cases alleging disability discrimination is whether or not the aggrieved person has a disability as defined in the FEHA. The Department alleges that complainant's condition of chronic trochanteric bursitis and muscle strain constitutes an actual physical disability. Respondent contends that the bursitis and strain neither "substantially limited," nor even "limited" complainant's major life activities, and therefore she does not have a protected disability, obviating any obligation to provide accommodation.

At the time of the acts at issue here, Government Code section 12926, subdivision (k) provided that a physical disability includes having a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that both:

> (1) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, and;
>
> (2) limits the individual's ability to participate in major life activities.

(Former Gov. Code, § 12926, subd. (k); Colemenares v. Braemar Country Club, supra, 29 Cal.4th at p. 1030.)

[1] Government Code section 12940, subdivisions (k) has since been recodified as subdivision (m). Several other provisions of the FEHA have also been renumbered or recodified. This decision will refer to the subdivisions in effect at the time of the events in the case.

The evidence established that complainant's chronic trochanteric bursitis and muscular strain constitute physiological conditions affecting her musculoskeletal system. Complainant's conditions, therefore, satisfy the first requirement of the FEHA's definition of physical disability. Until the California Supreme Court's decision in Colmenares, considerable debate surrounded the question of the extent to which a condition needed to limit an individual's ability to participate in major life activities--i.e., whether the condition needed to "substantially limit" or merely "limit" the individual's ability to participate in major life activities. Colmenares resolves this issue, holding that both prior and subsequent to the 2000 amendments to the FEHA (Stats. 2000, ch. 1049, § 5), a condition need only "limit" major life activities to meet the definition of a disability under the Act. Still, whether or not a condition actually limits "major life activities," such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," is a factual inquiry to be made on a case-by-case basis. (Gov. Code, § 12926, subd. (k)(1)(B); Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2).)

The evidence at hearing established that complainant's chronic trochanteric bursitis and muscular strain caused her to experience varying thresholds of pain when performing manual tasks including, stooping, twisting, and walking. Dr. Gillingham determined that complainant's condition resulted in an approximate 25 percent reduction of her former capacity to lift. And at times, the pain caused by her bursitis interrupted her ability to sleep. These basic and fundamental physical activities are central to complainant's activities both in caring for herself, and in performing her job duties. While complainant was ultimately able to care for herself and perform the physical demands of her job, the FEHA does not require that the disability result in utter inability or even substantial limitation on the individual's ability to perform major life activities.[2] A limitation is sufficient. The pain caused by complainant's bursitis and muscle strain limits her duration and capacity to engage in the major life activity of performing manual tasks, satisfying the second prong of the definition of a disability under the FEHA.[3] Complainant is therefore disabled within the meaning of the FEHA.

B. Failure to Accommodate Physical Disability

Having established that complainant is disabled under the FEHA, the Department contends that respondent violated its obligation to provide accommodation by refusing to

[2] In Colemenares, the Court expressly disapproved prior holdings in which courts found "minor" or "insubstantial" limitations not to constitute disabilities under the FEHA (colorblindness in Diffey v. Riverside County Sheriff's Dept. (2000) 84 Cal.App.4th 1031; ulcerative colitis in Hobson v. Raychem Corp. (1999) 73 Cal.App.4th 614).

[3] Under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101, et seq), some courts have found the specific inability to work overtime not a substantial limitation on the major life activity of working. (See, e.g., Boerst v. General Mills Operations, Inc. (6th Cir. 2002) 25 Fed.Appx. 403, 407; Kellogg v. Union Pacific R. Co. (8th Cir. 2000) 233 F.3d 1083, 1087; Tardie v. Rehabilitation Hosp. of Rhode Island (1st Cir. 1999) 168 F.3d 538, 542.) Given the distinctions in the statutory definitions of disability provided in the FEHA and the ADA, those holdings are inapplicable to this case.

grant complainant's request that her shifts be limited to a maximum of 12 hours. Respondent does not dispute that it did not provide the requested accommodation. Respondent, however, argues that this request would eliminate an essential job function--i.e., working up to 16 hours--rather than enabling her to perform it.[4] If proven, complainant's inability to perform an essential job function would relieve respondent of liability for its failure to grant complainant's requested accommodation. (Cal. Code Regs., tit. 2, § 7293.8, subd. (b); Ackerman v. Western Elec. Co., Inc. (9th Cir. 1988) 860 F.2d 1514.)

1. Inability to Perform an Essential Job Function

Under the FEHA, "essential functions" are "the fundamental job duties of the employment position the individual with a disability holds or desires." (Gov. Code, § 12926, subd. (f).) The inquiry into whether a function is essential is a highly fact-specific determination, which factors include: whether the position exists to perform that function; whether there are a limited number of employees available among whom the performance of that job function can be distributed; and whether the function is so highly specialized that a particular individual is hired for his or her expertise or ability to perform the particular function. (Gov. Code, § 12926, subd. (f)(1); Cal. Code Regs., tit. 2, § 7293.8, subd. (g)(1).) Evidence that a given job function is essential includes: the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experiences of past incumbents in the job; and the current work experience of incumbents in similar jobs. (Gov. Code, § 12926, subd. (f)(2); Cal. Code Regs., tit. 2, § 7293.8, subd. (g)(2).)

Modified work schedules may be considered a form of accommodation (Gov. Code, § 12926, subd. (m)(2); Cal. Code Regs., tit. 2, § 7293.9, subd. (a)(2).) However, the evidence at hearing was sufficient to establish that the ability to work some amount of overtime is an essential job function for respondent's nurses.[5] As a correctional facility, respondent is obligated to provide medical services 24 hours per day, seven days per week, and therefore

[4] When denying complainant's request for reasonable accommodation in June 1999, respondent primarily cited "undue hardship" as the reason. However, at hearing respondent did not pursue an undue hardship defense, instead arguing that complainant's inability to work double shifts, and her proposed accommodation, rendered her unable to perform an essential job function. Because the issues and evidence involving whether ability to work 16 hours is an essential job function and whether restricting complainant's work to 12 hours would pose an undue hardship overlap, this decision will evaluate the evidence as it relates to both potential defenses. Nonetheless, it remains respondent's burden to establish either defense.

[5] Under the ADA some courts have found mandatory overtime to constitute an essential job function. (See, e.g., Davis v. Florida Power & Light Co. (11th Cir. 2000) 205 F.3d 1301, 1305-1306, cert. denied, 531 U.S. 927 (mandatory overtime work was an essential function of utility lineman position); Tardie v. Rehabilitation Hosp. of Rhode Island (1st Cir. 1999) 168 F.3d 538, 544 (holding that working more than 40 hours per week was an essential function of employee's job as director of human resources.) These cases, however, do not analyze the issue in this case--i.e., a specific length of overtime as an essential job function. Moreover, whether ability to work any length of overtime work is an essential function is a highly fact-specific inquiry whose conclusion is dependent upon the unique circumstances of each case. (Davis v. Florida Power & Light Co., supra, 205 F.3d 1301, 1305-1306.)

requires round-the-clock specialized, highly trained personnel. In addition to the director of nursing's testimony that overtime generally was an essential job function, the need for nurses able to work overtime occasionally was well documented in respondent's job descriptions and collective bargaining agreement, and corroborated by complainant's own work experience. Also significant, complainant affirmed that the nursing positions were short-staffed as respondent had been unable to fill approximately one-third of its needed nursing positions as of June 1999.

However, the issue presented here is not whether overtime generally was an essential job function for respondent's registered nurses. Complainant was able to work four hours overtime following an eight hour shift, working a maximum of twelve hours. Thus, the actual point of contention is whether the ability to work specifically eight hours overtime, as opposed to merely four hours overtime, constituted an essential job function. On this point, respondent did not sustain its burden of proof.

The fundamental nature of the registered nurse position is the provision of nursing services, rather than simply physical presence at the facility for 16 hours. The nurses' regular shifts ranged between 8 and 12 hours, rather than 16 hours; and the collective bargaining agreement represented that respondent would make efforts to minimize overtime. Additionally, while respondent's former director of nursing expressed concern that it could not guarantee complainant would work any amount of overtime after an eight hour shift, complainant's stated restriction allowed her to work as many as four hours overtime rather than prohibiting any overtime. And though respondent had nine to ten unfilled nursing positions at the time complainant requested her accommodation, it regularly retained "registry" nurses to cover shifts at the various posts.

Because respondent did not submit specific evidence of the amount of double shifts its registered nurses actually worked, it cannot demonstrate that registered nurses frequently or even often worked double shifts to support its burden of proving double shifts was an essential job function. Complainant's work history with respondent, however, is revealing. Prior to being instructed not to report for work in June 1999, complainant had not worked a double shift since December 13, 1998. And during the approximate 22-month period from January 2000 through the time of hearing in October 2001, complainant had been ordered to work a 16-hour shift around five times.

Thus, considering the nature of complainant's job, her ability to work up to four hours of overtime, the evidence of the actual infrequency which she was actually required to work 16-hour shifts, the dearth of evidence of the amount of double shifts other nurses worked, and respondent's ability to cover potential overtime by assigning it to other persons, respondent did not sustain its burden to establish that the ability to work specifically 16-hours shifts was an essential job function.

2. Undue Hardship

Under the FEHA, an employer may be excused from granting a request for accommodation where it demonstrates the proposed accommodation would constitute an "undue hardship." (Gov. Code, § 12940, subd. (k); Cal. Code Regs., tit. 2, § 7293.9.) Whether the proposed accommodation would pose an undue hardship is considered in light of several factors, including:

(1) the nature and cost of the accommodation needed;
(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
(3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;
(4) the type of operations, including the composition, structure, and functions of the work force of the entity; and
(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

(Gov. Code, § 12926, subd. (p); Cal. Code Regs., tit. 2, § 7293.9, subd. (b).)

Here, respondent did not present evidence of its overall budget, its budget for medical personnel, its funds to employ registry nurses, or other evidence of the potential fiscal impact of limiting complainant's availability to work overtime. In absence of this evidence, respondent cannot establish the accommodation would pose an undue financial hardship.

Instead, respondent argued that losing the ability to order complainant to work eight hours of overtime could result in some posts being unstaffed. However, Nancy Clark testified that complainant's inability to work eight hours overtime on occasion would require another nurse to cover the shift, rather than actually force respondent to leave it unstaffed. The ability of another nurse, either respondent's employee or a registry nurse, to cover this overtime shift addresses respondent's concern of an unstaffed post, and respondent failed to present evidence that another nurse could not be made available for such coverage. Consistent with the availability of other nurses and further militating against a finding of undue hardship, respondent was willing and able to temporarily restrict complainant's shift to only eight hours for up to 120 days under respondent's modified duty policy. Respondent's director of nursing testified that temporarily granting that restriction of working only eight hours total--a restriction substantially more limited that complainant's request--presented little difficulty for respondent, despite staff vacancies and overtime among remaining nurses. On this record, respondent has failed to meet its burden to establish that granting complainant's request for accommodation would pose an undue hardship.

3. Good Faith Interactive Process

As an additional defense to its failure to provide reasonable accommodation, respondent argues that complainant failed to participate in this process and therefore, to the extent respondent was obligated to provide an accommodation to complainant, respondent cannot be held liable for failing to provide the accommodation.

An essential component of an employer's obligation to provide reasonable accommodation is the good faith, flexible interactive process, wherein the employer and employee work together in determining an accommodation satisfactory to both the employer's and the employee's needs. The interactive process is a mandatory rather than a permissive obligation, and is triggered by an employee or an employee's representative giving notice of a disability and desire for accommodation. (Jensen v. Wells Fargo Bank (2000) 85 Cal.App.4th 245, 261-262, quoting Barnett v. U.S. Air, Inc. (9th Cir. 2000) 228 F.3d 1105, vacated and remanded on other grounds (2002) 535 U.S. 391; see also, Rowe v. City & County of San Francisco (N.D.Cal. 2002) 186 F.Supp.2d 1047, 1051.) The obligation has been described as follows:

> "The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees" with the goal of "identify[ing] an accommodation that allows the employee to perform the job effectively." [Citation.] ... "[B]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." [Citation.] When a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to" 'isolate the cause of the breakdown ... and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.' " [Citations.]

(Jensen v. Wells Fargo Bank, supra, 85 Cal.App.4th at p. 261.)

Respondent's argument that complainant failed to engage in this process is unavailing as there is no evidence that respondent attempted to engage in an interactive process to determine the parameters and implications of complainant's physical limitations prior to instructing her not to report for work on June 14, 1999, and then formally denying complainant's accommodation request on July 1, 1999. Rather than attempting to determine through an interactive process with complainant and her physician whether or not complainant could work a 16-hour shift in rare or emergency situations, or attempt to ascertain alternative accommodations, respondent denied complainant's request outright and ordered her not to report for work.

Respondent's course of action was antithetical to the FEHA's obligation to engage in a good faith interactive process. By ordering complainant not to work despite her stated ability to work four hours of overtime, respondent temporarily lost a specially trained and experienced employee, and may well have exacerbated its scheduling difficulties and created even greater need for overtime among the remaining staff. Had respondent engaged in an interactive dialogue with complainant, however, it may have ascertained earlier that complainant's overtime restriction, while medically desirable, did not absolutely prevent her occasionally working as long as 16-hour shifts when necessary. As demonstrated through Dr. Wiens' January 5, 2000, note and complainant's work history since permitted to return to work, it is medically desirable that complainant not work 16-hour shifts because of their tendency to exacerbate the pain of her bursitis. But when called upon, complainant can physically endure the pain and perform her job duties throughout a 16-hour shift. Given that, had respondent elected to engage in an interactive dialogue with complainant and her physician, an accommodation satisfying both complainant's medical needs as well as respondent's staffing needs might have been achieved. Complainant did not fail to engage in an interactive process; respondent denied her request for accommodation without attempting to open the dialogue.

Respondent's argument that complainant caused a breakdown in the interactive process specifically by failing to respond to Warden Farmon's June 18, 1999, letter is similarly unpersuasive. In this letter, respondent advised complainant that it considered her unable to perform the duties of her position and offered her options, each of which prevented her from working in her position--i.e., complainant could elect to retire, undergo vocational rehabilitation, a demotion, or request to use leave time. Ostensibly ignoring that complaint had already submitted doctor's notes and a formal request for accommodation, the letter also advised that complainant could submit a request for accommodation. Thus, rather than addressing complainant's earlier request for accommodation and attempting to preserve her employment, respondent's letter focused on precluding her from working in her position. That manner of interaction falls short of respondent's obligations under the FEHA.

In summary, respondent did not establish that complainant's request to restrict her shifts to 12 hours would eliminate an essential function of the registered nurse position, or that granting this request would pose an undue hardship. Moreover, respondent did not establish that complainant failed to engage in an interactive process, and thus bore fault for respondent's failure to provide accommodation. Respondent will be held liable for failing to provide reasonable accommodation for complainant's disability in violation of Government Code section 12940, subdivisions (a) and (k).

C. Failure to take All Reasonable Steps to Prevent Discrimination From Occurring

The Department alleges that respondent failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (i).

Respondent established that it had a policy and system in place to respond to requests for accommodation and complaints of disability discrimination. Upon receiving Dr. Wiens' note indicating that complainant's shifts should be restricted due to her bursitis, respondent asked complainant to complete its Request for Reasonable Accommodation form. After complainant provided respondent this form, Nancy Clark undertook many reasonable and appropriate actions to determine whether or not the requested accommodation could be granted. However, as discussed above, after receiving complainant's formal request for accommodation, respondent failed to engage complainant in a good faith interactive process and instead took a unilateral course of action by ordering her not to report for work and denying the accommodation request outright. Thus, while respondent undertook many laudable steps in discharging its duty to take all reasonable steps necessary to prevent discrimination from occurring, its failed explore potential accommodation options with complainant in an interactive and meaningful way. "The hallmark of the FEHA is the flexibility it requires of employer to work with its disabled employees to accommodate their needs." (Sargent v. Litton Systems, Inc. (N.D.Cal. 1994) 841 F.Supp. 956, 962.) Given the importance of this obligation, under the circumstances presented, respondent's failure to engage in a flexible interactive process with complainant supports a determination that respondent failed to take all reasonable steps to prevent discrimination from occurring. Respondent will be held liable for violating Government Code section 12940, subdivision (i).

REMEDY

Having established that respondent discriminated against complainant in violation of FEHA by failing to provide her requested reasonable accommodation, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of such discrimination. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit.2, § 7286.9.) The Department seeks an order of back pay and actual damages for complainant's emotional distress.

A. Lost Wages

The Department contends that complainant is entitled to lost wages during the period she was not permitted to report for work, June 14, 1999, until January 11, 2000.

The evidence at hearing established that had respondent allowed complainant to work during this period, she would have earned a gross monthly salary of $4,054 in June, $4,054 in July, $4,208 in August and September, and $4371 in October, November, December, and January, respectively. However, complainant received industrial leave/workers'

compensation payments during the time she was not permitted to work, in the amount of two-thirds of the gross monthly amount.[6]

Therefore, respondent shall be ordered to pay complainant back pay based on the gross monthly salary complainant would have earned, offset by two-thirds, to reflect the workers compensation benefits she received for not working. For the period of June 14, 1999, to January 11, 2000, complainant's wage loss is as follows:

	Salary	Income Received	Lost Wages
June 1999	$4,054	$2,791.10	$2,791.10
July	$4,054	$2,805.30	$1,248.67
August	$4,208	$2,805.30	$1,402.67
September	$4,208	$2,914.00	$1,294.00
October	$4,371	$2,914.00	$1,457.00
November	$4,371	$2,914.00	$1,457.00
December	$4,371	$2,914.00	$1,457.00
January 2000	$4,371	$3,122.10	$1,248.86
TOTAL	$34,008	$23,180.00	**$10,828.09**

Complainant is additionally entitled to the prejudgment interest which would have accrued on her earnings but for respondent's unlawful conduct. (Gov. Code, § 12970; Code Civ. Proc., §§ 3287, subd. (a), and 3288.)[7] Thus, respondent shall be ordered to pay complainant the total amount of $13,500.54 in lost wages. Interest shall accrue on this amount at the annual rate of seven percent, from the date of this Order, until the date of payment. (Cal. Const., art. XV, § 1; Gov. Code § 965.5, subd. (b); California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal.4th 342, 351-353.)

B. Compensatory Damages for Emotional Distress

The Department requests that the Commission order respondent to pay actual damages to compensate complainant for emotional distress she suffered as a result of respondent's failure to grant her requested accommodation.

[6] Respondent asserts that given the favorable tax treatment of these workers compensation payments, complainant's net loss wages amounts to a total of $1,593.93 during this period. Respondent, however, provides no legal authority for the proposition that in calculating back pay, the stated value of workers' compensation payments are to be compared against the net tax-adjusted value of regular wages. Given the numerous factors which may alter complainant's ultimate tax obligation, this decision finds it inappropriate to award compensation for complainant's loss of wages based on the assumed tax consequences of the workers' compensation income she received and the income she would have received from respondent but for its unlawful conduct.

[7] Pursuant to Code of Civil Procedure, §§ 3287, 3288, and California Constitution, article XV, section 1, interest on complainant's back pay accrues at the rate of seven percent, compounded annually, from the date complainant was unlawfully denied the wages, to the date of this Order.

At the time the acts alleged in the accusation occurred, the Commission had the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $50,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. (Gov. Code, § 12970, subd. (b).) The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc. (1988) No. 88-05, FEHC Precedential Decs. 1988-1989, CEB 4, pp. 10-14.)

The evidence at hearing established that as a result of respondent's instruction that complainant not report for work on June 14, 1999, and its denial of her request for accommodation on July 1, 1999, complainant underwent some emotional distress. Complainant credibly testified that she first became angry when ordered not to report for work. Later complainant began to feel helpless and distraught as she worried that she, the sole-income earner, would be unable to support her family's financial obligations. Ultimately, this concern was mitigated because complainant received two-thirds of her gross salary through her workers' compensation benefits during the period she had not been allowed to work for respondent (June 14, 1999, to January 11, 2000). However, notwithstanding that income, during this time complainant experienced anxiety and difficulty sleeping, wondering whether or not she would ultimately be permitted to return to her job. The Department did not establish that complainant suffered any continuing emotional distress after complainant returned to work in January 2000.

In consideration of the foregoing, complainant will be awarded the sum of $20,000, for the emotional distress suffered as a result of respondent's precluding her from working in her position from June 14, 1999 to January 11, 2000, and failing to reasonably accommodate her disability.

C. Affirmative Relief

The Department asks that the Commission issue a cease and desist order against respondent, order respondent to prepare and implement a written policy regarding physical disability discrimination and reasonable accommodation, train its employees on the anti-discrimination provisions of the FEHA, post the Department's poster regarding employment discrimination, post a notice stating that respondent violated the FEHA, and provide proof of respondent's compliance with the Commission's order.

The Act authorizes the Commission to order affirmative relief including an order to cease and desist from any unlawful practice, and affirmative or prospective relief to prevent the recurrence of the unlawful practice. (Gov. Code, § 12970, subd. (a)(5).)

1. Cease and Desist Order

The Central California Women's Facility of respondent shall be ordered to cease and desist from unlawful discrimination by failing to provide reasonable accommodation for complainant's disability.

2. Anti-Discrimination & Reasonable Accommodation Policies

Respondent has developed extensive disability anti-discrimination and reasonable accommodation policies and procedures. However, respondent's policies and procedures presented at hearing fail to take into account the distinctions between its legal obligations under the ADA and the FEHA. Moreover, respondent failed to engage in a good faith interactive process with complaint prior to ordering her not to work and denying her request for accommodation. Thus, respondent will be ordered to develop new, or conform its existing, written policies and procedures regarding disability discrimination and reasonable accommodation to the requirements of the FEHA. Respondent will be ordered to train its employees at the Central California Women's Facility located in Chowchilla, California on these policies and procedures that have been developed or modified to conform to the FEHA.

Additionally, to inform its employees of their rights under the FEHA, respondent will be ordered to post the Department's poster regarding discrimination (DFEH 162) at the Central California Women's Facility and ordered to post at the Central California Women's Facility a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations with regard to unlawful disability discrimination (Attachment B) under the Act.

ORDER

1. The Central California Women's Facility of respondent Department of Corrections shall immediately cease and desist from unlawful discrimination by failing to provide reasonable accommodation for complainant's disability.

2. Within 60 days of the effective date of this decision, respondent California Department of Corrections shall pay to complainant Geri Leana Barr the amount of $13,500.54 for lost wages for the period from June 14, 1999, through January 11, 2000. Respondent shall also pay seven percent per year interest on this amount, running from the effective date of this decision to the date of payment.

3. Within 60 days of the effective date of this decision, respondent Department of Corrections shall pay to complainant Geri Leana Barr compensatory damages for emotional distress in the amount of $20,000, together with interest on this amount at the rate of seven percent per year, accruing from the effective date of this decision to the date of payment.

4. Within 180 days of the effective date of this decision, respondent Department of Corrections shall develop new, or conform its existing, written policies and procedures regarding disability discrimination and reasonable accommodation to the requirements of the FEHA. Within 240 days of the effective date of this decision, respondent shall train its employees at the Central California Women's Facility of respondent Department of Corrections on these policies and procedures that have been developed or modified to conform to the FEHA.

5. Within 60 days of the effective date of this decision, respondent Department of Corrections shall post, at the Central California Women's Facility of respondent Department of Corrections, the Department's poster regarding discrimination (DFEH 162), and a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations with regard to unlawful disability discrimination (Attachment B) under the FEHA.

6. Within 270 days after the effective date of this decision, an authorized representative of respondent Department of Corrections shall, in writing, notify the Department and the Commission of the nature of its compliance with paragraphs two through five of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

Dated: September 16, 2003

GEORGE WOOLVERTON

HERSCHEL ROSENTHAL

LISA DUARTE

JOSEPH JULIAN

ATTACHMENT A

ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WITH
CALIFORNIA DEPARTMENT OF CORRECTIONS

After a full hearing, the California Fair Employment and Housing Commission has found that California Department of Corrections is liable for a violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, et seq.), by failing to provide reasonable accommodation for an employee's disability. (Dept. Fair Empl. & Hous. v. California Department of Corrections (2003) No._____.) As a result of the violation, California Department of Corrections has been ordered to post this notice and to take the following actions:

1. Cease and desist at the Central California Women's Facility from violating employees' and/or applicants' rights under the FEHA and under the disability discrimination provisions of the Fair Employment and Housing Act.

2. Pay the employee back pay and compensatory damages for emotional distress.

3. Develop policies regarding the FEHA and disability discrimination, and conduct training at the Central California Women's Facility about these rights remedies.

4. Post a statement at the Central California Women's Facility about employees' and applicants' rights and remedies regarding the FEHA and disability discrimination.

Dated: _____ By: _____
Authorized Representative for California
Department of Corrections

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

DISCRIMINATION: YOUR RIGHTS AND REMEDIES UNDER THE FAIR EMPLOYMENT AND HOUSING ACT

THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT PROHIBITS DISCRIMINATION AND HARASSMENT BECAUSE OF RACE, RELIGIOUS CREED, COLOR, NATIONAL ORIGIN, ANCESTRY, PHYSICAL AND MENTAL DISABILITY, MEDICAL CONDITION, MARITAL STATUS, SEX, SEXUAL ORIENTATION, OR AGE.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (DFEH) investigates and prosecutes complaints of discrimination or harassment in employment. If you think you are being discriminated against or harassed on any of the above bases, you may file a complaint with the Department:

Department of Fair Employment and Housing
Fresno District Office
1320 East Shaw Avenue, Suite 150
Fresno, CA 93710
Telephone:
(559) 244-4760
(800) 884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission (FEHC). The Commission may order the discrimination or harassment stopped and can require your employer to pay money damages and reinstate you or give other appropriate relief.

Dated: _____ By: _____
Authorized Representative for California
Department of Corrections

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.